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No. 97-1839

In the Supreme Court of the United States

OCTOBER TERM, 1997

SANTEE SIOUX TRIBE OF NEBRASKA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. 2710(d)(1)(B), prohibits Indian Tribes from conducting forms of Class III gaming that state law completely prohibits.

2. Whether the compacting provisions of IGRA are valid and enforceable in light of *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Cheyenne River Sioux Tribe v. *South Dakota*, 3 F.3d 273 (8th Cir. 1993)	6
Citizen Band Potawatomi Indian Tribe v. *Green*, 995 F.2d 179 (10th Cir. 1993)	6, 7
Mashantucket Pequot Tribe v. *Connecticut*, 913 F.2d 1024 (2d Cir. 1990), cert. denied, 499 U.S. 975 (1991)	6
Rumsey Indian Rancheria of Wintun Indians v. *Wilson*, 64 F.3d 1250 (9th Cir. 1994), cert. denied, 117 S. Ct. 2508 (1997)	6
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996)	4, 7
Sycuan Band of Mission Indians v. *Wilson*, 117 S. Ct. 2508 (1997)	7
United States v. *Spokane Tribe of Indians*, 139 F.3d 1297 (9th Cir. 1998)	8

Statutes and regulation:

Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701-2721	2
25 U.S.C. 2703(6)-(8)	2
25 U.S.C. 2703(7)(B)	2
25 U.S.C. 2704-08	2
25 U.S.C. 2710(d)(1)	2
25 U.S.C. 2710(d)(1)(B)	4, 5, 8
25 U.S.C. 2710(d)(1)(C)	8
25 U.S.C. 2710(d)(6)	6, 7

Statutes and regulation—Continued: Page

Indian Major Crimes Act:
18 U.S.C. 1166-1168 2
18 U.S.C. 1166(a) 4
28 U.S.C. 516 4
25 C.F.R. 502.4 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 135 F.3d 558. The opinions of the district court (Pet. App. 18-27, 29-37) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1998. A petition for rehearing was denied on April 2, 1998. Pet. App. 75. The petition for a writ of certiorari was filed on May 14, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701-2721; 18 U.S.C. 1166-1168, established a framework for regulating Indian gaming. IGRA created three classes of Indian gaming, 25 U.S.C. 2703(6)-(8). Class III gaming, at issue here, includes house-banked card games, casino games, slot machines, electronic and electromechanical facsimiles of any game of chance, sports betting, parimutuel wagering, and lotteries. 25 U.S.C. 2703(7)(B); 25 C.F.R. 502.4. IGRA allows Class III gaming activities on tribal lands as long as such activities are: (1) authorized under a tribal ordinance or resolution; (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity"; and (3) conducted in conformance with a Tribal-State compact. 25 U.S.C. 2710(d)(1). The National Indian Gaming Commission has authority to monitor and regulate Class III gaming. 25 U.S.C. 2704-2708.

2. The Santee Sioux Tribe (petitioner) began negotiations with the State of Nebraska seeking to conduct Class III gaming on its tribal lands. Pet. App. 2. After failing to reach an agreement with the State, petitioner opened a Class III gaming facility on its Reservation that offered video slot machines, video poker machines, and video blackjack machines. *Ibid.*

The Chairman of the National Indian Gaming Commission determined that petitioner's Class III gaming activities violated IGRA, and ordered petitioner to close its casino. Pet. App. 3-4. After receiving an extension of the closure date, petitioner closed its casino, but appealed the Chairman's order to the full Commission. *Id.* at 4.

Petitioner brought suit in the United States District Court for the District of Nebraska seeking an order that the compacting provisions of IGRA are unconstitutional and that the State of Nebraska regulates rather than prohibits Class III gaming. Pet. App. 4. Petitioner also sought an order enjoining the Commission and the United States Department of Justice from enforcing gaming laws against petitioner. *Ibid.* Petitioner then reopened its casino. *Ibid.*

In response, the United States filed suit against petitioner in the same district court requesting a declaratory judgment that petitioner's operation of video slot, blackjack, and poker machines violates federal and state law. Pet. App. 4. The United States also sought enforcement of the Chairman's closure order, and an injunction to stop petitioner's gaming in the absence of a valid Tribal-State compact. *Ibid.* The two suits were consolidated. *Ibid.*

3. The district court dismissed petitioner's suit, holding that the Chairman's temporary closure order was not final agency action. Pet. App. 21-22. The district court also dismissed the government's suit. *Id.* at 25-26. The court held that the United States did not have authority to enforce the Chairman's closure order. *Id.* at 25. The court further held that injunctive relief was not otherwise available because courts do not generally enjoin a crime and the exception to that principle for cases in which there is statutory authority to issue injunctive relief did not apply. *Id.* at 26.

The full Commission thereafter upheld the Chairman's closure order, and the United States sought leave to file a supplemental pleading in the district court concerning the Commission's action. Pet. App.

5. The district court denied the motion, on the ground that the Commission had neither authorized nor directed the United States to seek injunctive relief to enforce its order. *Ibid.*

4. The court of appeals reversed. Pet. App. 1-17. The court held that the Attorney General of the United States had authority under 28 U.S.C. 516 to seek enforcement of the Commission's closure orders, and that the district court should have enforced those orders. Pet. App. 5-8. The court also held that, independent of the government's authority to seek enforcement of the Commission's closure order, the United States was entitled to injunctive relief to prevent the operation of petitioner's Class III gaming activities. *Id.* at 11-16. The court noted that 18 U.S.C. 1166(a) incorporates state law prohibitions on Class III gaming, as well as state law remedies for violations of those prohibitions. Pet. App. 11-12, 14-15. Finding that the forms of Class III gaming conducted by petitioner "are illegal in Nebraska," *id.* at 12, and that "injunctive relief is available to halt illegal gambling activity under Nebraska State law," *id.* at 15, the court concluded that "the District Court erred in refusing to grant the government's request for an order enjoining [petitioner's] gaming activities," *id.* at 16.

Finally, the court of appeals concluded that it was unnecessary to address petitioner's contention that IGRA's compacting provisions are invalid following *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). Pet. App. 16. The court reasoned that, under 25 U.S.C. 2710(d)(1)(B), the State is not required "to negotiate with respect to forms of gaming it does not presently permit." Pet. App. 16.

ARGUMENT

1. a. Petitioner contends (Pet. 10-11) that certiorari should be granted to review the court of appeals' holding that a State is not required by IGRA to negotiate over forms of gaming that it regulates rather than prohibits. The court of appeals, however, did not hold that a State need not negotiate over forms of gaming that it merely regulates. Instead, it held that a State need not negotiate over forms of gaming that it prohibits. Pet. App. 16. Finding it "undisputed that petitioner is operating video poker, blackjack, and slot machines in its gaming facility," *id.* at 12, and determining that "[those] forms of gambling are illegal in Nebraska," *ibid.*, the court concluded that the State was not required to negotiate with petitioner concerning such gaming, *id.* at 16.

The court of appeals' holding that a State need not negotiate over a form of gaming that its laws prohibit is correct. Under 25 U.S.C. 2710(d)(1)(B), "Class III gaming activities shall be lawful on Indian lands only if such activities are * * * located in a State that permits such gaming for any purpose by any person, organization, or entity." That statutory text makes it unlawful for Tribes to operate forms of Class III gaming that state law completely prohibits. A State therefore has no duty to negotiate with respect to those forms of gaming.

Petitioner contends (Pet. 11 & n.8) that Nebraska statutes permit the forms of gaming petitioner conducts, subject to regulation. As the court of appeals determined, however, that contention is "not well taken given the uniform prohibition of these devices under the State's statutory scheme." Pet. App. 13. In any event, petitioner's contention that the court

below misinterpreted Nebraska law does not warrant this Court's review.

b. Petitioner contends (Pet. 8-18) that review is warranted in order to resolve a conflict among the circuits concerning a State's duty to negotiate under IGRA. There is, however, no conflict on the question resolved by the court of appeals in this case. The two appellate courts that have addressed the question have both held that a State has no duty to negotiate with respect to a form of gaming that its laws absolutely prohibit. *Cheyenne River Sioux Tribe* v. *South Dakota*, 3 F.3d 273, 279 (8th Cir. 1993) (State is not required to negotiate "with respect to forms of gaming it does not presently permit"); *Rumsey Indian Rancheria of Wintun Indians* v. *Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994) ("We agree with the approach taken by the Eighth Circuit. IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming."), cert. denied, 117 S. Ct. 2508 (1997).

Mashantucket Pequot Tribe v. *Connecticut*, 913 F.2d 1024, 1033 (2d Cir. 1990), cert. denied, 499 U.S. 975 (1991), relied upon by petitioner (Pet. 12-13), holds that a State has a duty to negotiate with respect to forms of gaming that its laws permit, albeit subject to extensive regulation. There is no conflict between that decision and the holding of the court of appeals in this case that a State has no duty to negotiate with respect to forms of gaming that its laws absolutely forbid.

Citizen Band Potawatomi Indian Tribe v. *Green*, 995 F.2d 179, 180-181 (10th Cir. 1993), also cited by petitioner (Pet. 15-16), involved the construction of a different provision of IGRA—25 U.S.C. 2710(d)(6).

That provision creates an exception to the prohibition in the Johnson Act on the use of gambling devices. The exception applies to gaming conducted pursuant to a Tribal-State compact that is entered into by a State "in which gambling devices are legal." See 25 U.S.C. 2710(d)(6). Because Oklahoma law prohibited the possession of all gambling devices, the Tenth Circuit held that the exception did not apply. 995 F.2d at 181. That decision does not address the question presented in this case—whether a State has a duty under IGRA to negotiate with respect to particular forms of gaming that its laws prohibit. The holding of the court below that a State has no such duty does not conflict with the decision of any other circuit.

Last year, this Court denied a petition for a writ of certiorari seeking review of the Ninth Circuit's decision in *Rumsey Indian Rancheria*, in which the Tribes made the same claim of a conflict among the decisions of the courts of appeals on which petitioner relies here. *Sycuan Band of Mission Indians* v. *Wilson*, 117 S. Ct. 2508 (1997). There is no reason for a different disposition of the petition here.

2. Petitioner also contends (Pet. 21-25) that the Class III compacting provisions of IGRA cannot be enforced in light of the holding in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), that a State may assert immunity from a suit alleging that it has failed to negotiate in good faith. That contention does not warrant review. The court of appeals declined to address that contention, on the ground that petitioner not only has been conducting Class III gaming without a compact, but that in doing so it has also been operating forms of gaming that are illegal under Nebraska law. Pet. App. 16. The court of appeals did not err in that respect.

IGRA not only prohibits Class III gaming without a Tribal-State compact; it also independently prohibits the operation of forms of Class III gaming that are illegal under state law. 25 U.S.C. 2710 (d)(1)(B), (C). Because Nebraska law absolutely forbids the forms of gaming conducted by petitioner, an injunction prohibiting such gaming was appropriate, whether or not the separate prohibition against gaming without a compact may be enforced against a Tribe after *Seminole Tribe*. The court of appeals therefore correctly concluded that it was unnecessary to decide in this case whether the prohibition against uncompacted gaming remains valid and enforceable after *Seminole Tribe*.

Petitioner's reliance on *United States* v. *Spokane Tribe of Indians*, 139 F.3d 1297 (9th Cir. 1998), is misplaced. In that case, the United States sought to enjoin a Tribe's Class III gaming operation solely on the ground that it was being conducted without a Tribal-State compact. *Id.* at 1298. The Ninth Circuit held that, in light of *Seminole Tribe*, the prohibition against gaming without a compact could not, on the record before the court in that case, serve as the foundation for a preliminary injunction prohibiting the Tribe from continuing to conduct its gaming operation. *Id.* at 1301. The Ninth Circuit did not, however, address whether the separate prohibition against the operation of forms of gaming that are illegal under state law may serve as the basis for an injunction against such gaming. Instead, it left that issue open. *Ibid.* There is therefore no conflict between *Spokane Tribe* and the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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